

FILED '08 MAR 25 15:00 USDC-ORF

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

STEVEN C. FORBESS,	)	
	)	No. CV 05-1527-HU
Plaintiff,	)	
	)	
v.	)	FINDINGS AND
	)	
BRIAN BELLEQUE, et al.	)	RECOMMENDATION
	)	
Defendants.	)	

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Steven C. Forbess  
#5968485  
Oregon State Penitentiary  
2605 State Street  
Salem, Oregon 97310  
Pro se

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Attorney General  
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Attorneys for defendants

HUBEL, Magistrate Judge:

Plaintiff Steven Forbess brought this action under 42 U.S.C.  
§ 1983, alleging that defendants have provided him constitutionally

1 inadequate medical care in violation of his Eighth Amendment right  
2 to be free from cruel and unusual punishment. Forbess seeks  
3 compensatory and punitive damages and declaratory relief.  
4 Defendants move to dismiss the complaint pursuant to Rule 12(b)(6)  
5 of the Federal Rules of Civil Procedure, on the grounds of claim  
6 and issue preclusion.

#### 7 **Factual and Procedural Background**

8 Forbess is incarcerated at Oregon State Penitentiary (OSP). In  
9 October 2004, Forbess filed a petition for writ of habeas corpus in  
10 the Circuit Court for Marion County, alleging that he received  
11 constitutionally inadequate treatment for a broken fifth metacarpal  
12 in his right hand, incurred in 2000, torn ligaments in his right  
13 wrist incurred in September 1998, and back pain resulting from a  
14 protruding disc diagnosed in approximately 1997. Defendants'  
15 Exhibit 101, *passim*. Forbess alleged that he "wants and needs"  
16 surgery to repair the broken bone in his hand and the torn  
17 ligaments of his right wrist, *id.* at ¶ 37, and either a laminectomy  
18 or, "what he really needs," joint and disc replacement surgery to  
19 alleviate his back pain. *Id.* at ¶ 51.

20 Forbess filed this civil rights action in the district court  
21 on October 3, 2005, while the petition for habeas corpus was  
22 pending in state court. (Doc. #2)

23 On September 21, 2006, Forbess's habeas corpus petition based  
24 on constitutionally inadequate medical care for medical conditions  
25 involving his right hand, right wrist, and lower back was tried in  
26 the Circuit Court for Marion County, Circuit Court Judge Joseph

1 Guimond presiding. Defendants' Exhibits 102, 103. Forbess was  
2 represented by counsel, Scott Howell. Exhibit 102. Forbess gave  
3 testimony at the trial, as did Richard Degner, M.D., a physician at  
4 OSP. The Circuit Court judge noted at the beginning of the trial  
5 that the two issues presented were whether Forbess had established  
6 a serious medical condition, and whether the defendant Brian  
7 Belleque, superintendent of OSP, had acted with deliberate  
8 indifference to Forbess's serious medical needs. Exhibit 102, 5:16-  
9 21.

10 Forbess testified that he had ongoing severe low back pain,  
11 beginning when he had a spinal fusion for scoliosis at the age of  
12 15. Id. at 8:17-20. Since that time he had had three back  
13 surgeries. Id. at 8:21-24. In 1998, he had surgery to repair a  
14 fusion break at L3-4, and at that time was diagnosed with disc  
15 protrusion at L4-5. Id. at 9:5-20. Forbess testified that he has  
16 seen prison doctors for the low back pain, and has received pain  
17 medication including Neurontin, but that the drugs have not  
18 curtailed the pain or else have caused side effects, and "I know I  
19 need a laminectomy," id. at 15:19, or a facet replacement. Id. at  
20 16:7-8. Forbess testified that he also wants surgery to repair the  
21 torn ligaments in his hand, id. at 19:11-14, a surgical procedure  
22 on the broken metacarpal in his hand in which the bone is re-  
23 broken, aligned and set, id. at 21:4-6, better pain medication, and  
24 a consultation with an orthopedic specialist. Id. at 23:1-8.

25 Dr. Degner testified that in his opinion, Forbess's back pain  
26 was the result of degenerative arthritis, rather than nerve root

1 compression caused by a protruding disc. Id. at 30:14-20. Dr.  
2 Degner said that generally surgery is not recommended for  
3 degenerative arthritis. Id. at 40:4-9. Dr. Degner opined that for  
4 a ligament tear, surgery might be appropriate within the first week  
5 of injury, but immobilization of the joint will cause the ligaments  
6 to heal. Id. at 40:17-25. In Dr. Degner's opinion, "if you wait a  
7 long time on a ligament tear, then any kind of surgical  
8 intervention is really not indicated." Id. at 41:1-4. Dr. Degner  
9 testified that he believed surgery on Forbess's hand or wrist would  
10 "end up being more harmful to him than helpful." Id. at 41:9-11.

11 On October 5, 2006, Judge Guimond issued a ruling by letter,  
12 noting that both sides agreed Forbess's low back condition was a  
13 "serious medical condition," but that defendants disputed the  
14 seriousness of Forbess's right hand conditions. Exhibit 103. The  
15 court did not resolve the dispute about whether the conditions were  
16 serious, because the judge concluded that the "deliberate  
17 indifference" element had not been shown. Judge Guimond held as  
18 follows:

19 I am compelled to agree with the defendant that there has  
20 been no showing of any "deliberate indifference" on  
21 behalf of the defendant. As the defendant points out, the  
22 surgery that plaintiff wants for his back has not been  
23 recommended by the ortho specialist. There is simply no  
24 medical evidence that a further invasive surgery on  
25 plaintiff's low back would bring him any relief. As to  
26 his hand, there is a difference of opinion as to whether  
27 plaintiff should be referred to [a] specialist. An honest  
28 difference of opinion between medical providers as to the  
proper course of treatment for an individual does not  
establish "deliberate indifference" [.] See Billings v.  
Gates, 323 Or. at 167 (1966). Accordingly, I find that  
plaintiff's petition for Habeas Corpus relief should be  
denied.

1 Id.

2 **Discussion**

3 Federal courts have traditionally adhered to the related  
4 doctrines of res judicata (claim preclusion) and collateral  
5 estoppel (issue preclusion). Allen v. McCurry, 449 U.S. 90, 94  
6 (1980). The rules of issue and claim preclusion are generally  
7 applicable to § 1983 actions. Id. at 96.

8 Although federal courts look to the common law supporting  
9 issue and claim preclusion in assessing the preclusive effect of  
10 decisions of other federal courts, Congress has specifically  
11 required all federal courts to give preclusive effect to state  
12 court judgments whenever the courts of the state from which the  
13 judgment emerged would do so. Id. at 96; 28 U.S.C. § 1738. Under §  
14 1738, the full faith and credit statute, federal courts must "give  
15 the same preclusive effect to a state court judgment as another  
16 court of that state would give." Parsons Steel, Inc. v. First  
17 Alabama Bank, 474 U.S. 518, 523 (1986); Palomar Mobilehome Park v.  
18 City of San Marcos, 989 F.2d 362, 364 (9<sup>th</sup> Cir. 1993).

19 Traditional claim preclusion is applied in Oregon. Harris v.  
20 Jacobs, 621 F.2d 341 (9<sup>th</sup> Cir. 1980), citing McAllister v. Charter  
21 First Mortgage, Inc., 279 Or. 285 (1977); Waxwing Cedar Prods.,  
22 Ltd. v. Koennecke, 278 Or. 603, 610-11 (1977).

23 In Harris, 621 F.2d at 343 & n. 3, the court held that a  
24 federal civil rights claim for inadequate medical treatment from  
25 prison medical personnel that was fully adjudicated on the merits  
26 in a state habeas proceeding is precluded from further litigation

1 in federal court, under both federal and Oregon rules of claim  
2 preclusion. The Ninth Circuit revisited the issue with the same  
3 results in Silverton v. Department of the Treasury, 644 F.2d 1341,  
4 (9<sup>th</sup> Cir. 1981), holding that

5 because of the nature of a state habeas proceeding, a  
6 decision actually rendered should preclude an identical  
7 issue from being relitigated in a subsequent § 1983  
8 action if the state habeas court afforded a full and fair  
9 opportunity for the issue to be heard and determined  
10 under federal standards.

11 644 F.2d at 1347.

12 The gravamen of the complaint filed in this case is the same  
13 as the habeas corpus petition filed in the Circuit Court for Marion  
14 County--that the actions of OSP medical personnel between 2001 and  
15 October 2005, in failing to alleviate the pain in his back and  
16 right hand, have constituted deliberate indifference to Forbess's  
17 serious medical needs. The issue presented in this case is the same  
18 issue that was presented in the state court habeas proceeding,  
19 i.e., whether Forbess has received constitutionally inadequate  
20 medical treatment from prison medical personnel.<sup>1</sup> The Circuit Court  
21 afforded Forbess a full and fair opportunity to litigate the  
22 constitutional issues he presented in his habeas corpus petition.

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23 <sup>1</sup> In order to succeed on a § 1983 claim for inadequate  
24 medical treatment, plaintiff must demonstrate that the health  
25 care professional showed "deliberate indifference to his serious  
26 medical needs." Estelle v. Gamble, 429 U.S. 97, 104 (1976).  
27 Further, the deliberate indifference must be both "purposeful"  
28 and "substantial" in nature. United States v. Scrivner, 167 F.3d  
514, 525 (9th Cir. 1999). To state a claim, a prisoner must show  
that the official knew of and disregarded a substantial risk of  
serious harm to his health or safety. Farmer v. Brennan, 511 U.S.  
825, 837 (1994).

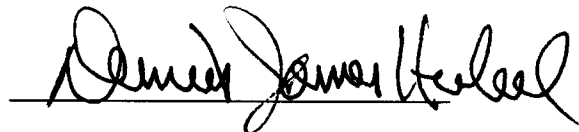
1 **Conclusion**

2 I recommend that defendants' motion to dismiss (doc. # 50) be  
3 GRANTED on the ground of claim preclusion.

4 **Scheduling Order**

5 The above Findings and Recommendation will be referred to a  
6 United States District Judge for review. Objections, if any, are  
7 due April 8, 2008. If no objections are filed, review of the  
8 Findings and Recommendation will go under advisement on that date.  
9 If objections are filed, a response to the objections is due April  
10 22, 2008, and the court's review of the Findings and Recommendation  
11 will go under advisement with the District Judge on that date.

12 Dated this 25<sup>th</sup> day of March, 2008.

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16 Dennis James Hubel  
17 United States Magistrate Judge  
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